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1ST CIRCUIT COURT  
STATE OF HAWAII  
FILED

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CLERK

Attorneys for Plaintiffs SCI MANAGEMENT L.P.;  
HAWAIIAN MEMORIAL PARK CEMETERY;  
HAWAIIAN MEMORIAL LIFE PLAN, LTD. dba  
BORTHWICK MORTUARIES; and DEREK KIM

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SCI MANAGEMENT L.P.; HAWAIIAN  
MEMORIAL PARK CEMETERY;  
HAWAIIAN MEMORIAL LIFE PLAN,  
LTD. dba BORTHWICK MORTUARIES;  
and DEREK KIM,

Plaintiffs,

v.

HARRY YEE, FAYE KENNEDY, JACK  
LAW, JUNE MOTOKAWA, and  
ALLICYN HIKIDA-TASAKA, in their  
official capacities as Commissioners of the  
HAWAII CIVIL RIGHTS COMMISSION,  
DEPARTMENT OF LABOR &  
INDUSTRIAL RELATIONS, STATE OF  
HAWAII; WILLIAM D. HOSHIO, in his  
official capacity as Executive Director of the  
HAWAII CIVIL RIGHTS COMMISSION,  
DEPARTMENT OF LABOR &  
INDUSTRIAL RELATIONS, STATE OF  
HAWAII; DARRYLLYNNE SIMS; and  
TAMMY QUINATA,

Defendants.

CIVIL NO. 01-1-0776-03 DTK  
(Declaratory Judgment)

ORDER GRANTING PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT  
ON FIRST AMENDED COMPLAINT FOR  
DECLARATORY JUDGMENT AND  
INJUNCTIVE RELIEF FILED APRIL 12,  
2001

HEARING:

Date: June 26, 2001

Time: 1:30 p.m.

Judge: Honorable Dan T. Kochi

**ORDER GRANTING PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT ON FIRST AMENDED  
COMPLAINT FOR DECLARATORY JUDGMENT  
AND INJUNCTIVE RELIEF FILED APRIL 12, 2001**

Plaintiffs SCI MANAGEMENT L.P., HAWAIIAN MEMORIAL PARK CEMETERY, HAWAIIAN MEMORIAL LIFE PLAN, LTD. dba BORTHWICK MORTUARIES, and DEREK KIM's ("Plaintiffs") Motion For Summary Judgment On First Amended Complaint For Declaratory Judgment And Injunctive Relief Filed April 12, 2001 ("Motion") came on for hearing on June 26, 2001 before the Honorable Dan T. Kochi.

Appearing for Plaintiffs were Jeffrey S. Portnoy, David F.E. Banks and Kristin S. Shigemura. John H. Ishihara appeared on behalf of Defendants Harry Yee, Jack Law, Faye Kennedy, Allicyn Hikida Tasaka and June Motokawa, in their official capacities as Commissioners of the Hawaii Civil Rights Commission, Department of Labor and Industrial Relations, State of Hawaii. April Wilson-South appeared on behalf of Defendant William D. Hoshijo, in his official capacity as Executive Director of the Hawaii Civil Rights Commission, Department of Labor and Industrial Relations, State of Hawaii. Gale L. F. Ching appeared on behalf of Darryllynne Sims, present at the hearing, and Darwin L. D. Ching appeared on behalf of Tammy Quinata, who was present at the hearing.

The Court has thoroughly reviewed the written submissions of counsel, the record and file herein, and the oral argument of counsel and, finding that there is no genuine issue of material fact, makes the following findings and order:

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**ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON FIRST AMENDED  
COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF FILED APRIL 12, 2001.  
*SCI Management L.P. et al. v. Harry Yee et al.*,  
First Circuit Court, Civil No. 01-1-0776-03 DTK (Declaratory Judgment)**

It is undisputed by the parties that Hawaii Revised Statutes § 368-12 and Hawaii Administrative Rules 12-46-20 permit a complainant who has filed a complaint for discrimination in the Hawaii Civil Rights Commission ("HCRC") to receive a right to sue letter from the HCRC and initiate a civil lawsuit in the Circuit Court where a jury trial may be requested, at any time up until the expiration of three days after the case has been docketed for contested case hearing. The Court finds it is also undisputed that the provisions of Hawaii Revised Statutes § 368-12 and Hawaii Administrative Rules 12-46-20 permit only complainants to bypass the HCRC proceedings and exercise their constitutional right to a jury trial, but does not grant a similar right to respondents.

The right to jury trial in cases at common law where the amount in controversy is greater than \$5,000.00 is a fundamental right guaranteed by Article I § 13 of the Hawaii Constitution. See Richardson v. Sport Shinko, 76 Hawai'i 494, 513, 880 P.2d 169, 188 (1994); HAWAII CONSTITUTION, Art. I, sec. 13. Where a statute implicates the fundamental right to jury trial, and permits different classes of persons different access to the right, the State has the burden of demonstrating that it meets strict scrutiny standards by showing that the provisions are narrowly tailored to avoid the unnecessary abridgement of constitutional rights. Baehr v. Lewin, 74 Haw. 530, 572-73, 852 P.2d 44, 63-64 (1993).

The Commission has cited Atlas Roofing Co. Inc. v. Occupational Safety and Health Review Commis., 430 U.S. 442, 450 (1977) and the issue of public rights to support its opposition to the Motion. However, the Court feels that the Atlas Roofing case is inapplicable to this particular situation in that in the Atlas Roofing case, there were no private remedies

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involved. Atlas Roofing concerned the pursuit of certain remedies, consisting of an abatement order to correct unsafe working conditions and civil penalties, by an agency of the federal government. What we have here is a situation where the statute gives to the complainant the right to seek compensatory damages, including punitive damages. Had we had the same situation in this case as in Atlas Roofing, where the remedies being sought by the Hawaii Civil Rights Commission asserted certain equitable remedies and also maybe a fine paid to the State, then possibly the Atlas Roofing case would be pertinent.

However what we have in this case is private recovery. At the hearing on the Plaintiffs' Motion For Preliminary Injunction, the Commission argued that the federal government had a system that was identical to that of the Federal Equal Employment Opportunity Commission ("EEOC"). But that is not a correct statement of the procedure that is followed by the EEOC.

Under Title VII of the Civil Rights Act of 1964 (The "Civil Rights Act" codified at 42 U.S.C. § 2000e et seq.) and up until 1991, the only recovery that was permitted to complainants was equitable remedies. However, in 1991, Congress amended the Civil Rights Act pursuant to the Compensatory Damages Amendment ("CDA" codified at 42 U.S.C. § 1981a) that permitted compensatory damages to be recovered by complainants. Under that scheme, there were two types of recoveries: one recovery in the situation where you have a private employer, and that would be under Section 706 of the Civil Rights Act (42 U.S.C. § 2000e-5), and the other as against the Federal government and its agencies as employer, Section 717 (42 U.S.C. § 2000e-16).

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Under Section 706, recovery as permitted against private employers is covered under 42 U.S.C. 1981a(c), in which if a complaining party seeks compensatory damages under the CDA any party may demand a jury trial. However, under Section 717(c) of Title VII, the Federal government was not entitled to the same rights. And that was the basis of West v. Gibson, 527 U.S. 212, 144 L.Ed.2d 196 (1999) that the Commission cited to previously. The argument in that case was whether or not the EEOC could, in fact, grant compensatory damages in favor of the complainant and against the Veterans Administration. There was an argument in the U.S. Supreme Court opinion as to whether or not there was a valid waiver of sovereign immunity. The majority in that case indicated that there had been a waiver and that Congress, in fact, waived its sovereign immunity.

In this case, if we were arguing with regard to the State or State agency being the employer, then West v. Gibson would hold because, arguably, an argument can be made that the State, by the enactment of H.R.S. Chapter 368, waived its sovereign immunity and, therefore, is not entitled to a jury trial.

Finally, the Court will address the argument raised by Defendant Quinata that the Plaintiffs have waived their right to a jury trial. It may be that parties can waive their rights to a jury trial and also waive their rights to have their claims asserted before the HCRC in that our State Supreme Court in Brown v. KFC Management, Inc., 82 Hawai'i 266, 921 P.2d 146 (S. Ct. 1996), upheld the validity of the arbitration clause in an employment contract. Also, the United States Supreme Court, in a fairly recent decision in Circuit City Stores, Inc. v. Adams, U.S. Supreme Court No. 99-1379 (decided March 21, 2001), upheld the validity of the arbitration

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clause in an employment contract under the Federal Arbitration Act. So, if there is, in fact, a valid arbitration agreement, the parties may be able to waive their rights to a jury trial, and in fact, may be bound to proceed through arbitration outside of the HCRC. But we do not have that issue here because none of the parties had asserted that contract in the issue that is presently before the Court. The only issue that is presently before this Court is the issue of whether or not the scheme that the Legislature has set forth in Chapter 368, where it grants the complainant the right to assert the complainant's right to jury trial and where the respondent who is similarly situated is not entitled to assert that same right, is Constitutionally valid.

The Court finds that the Defendants have not met their burden of establishing through admissible and competent evidence that the provisions of HRS Ch. 368 meet strict scrutiny review. The Hawaii Constitution provides that parties are, if an action is filed in the courts, entitled to a jury trial where it is a matter of common law. HAWAII CONSTITUTION, Art. I, sec. 13. So what we have here is a scheme where one party is permitted to assert his or her Constitutional rights and the other party is not. Under H.R.S. Section 368-12, the right to sue provision, is provided only to the complainant and under the Hawaii Administrative Rules 12-46-20(b)(1) only the complainant is permitted to opt out of the proceedings before the Civil Rights Commission. This statute and rule are applied to the Plaintiffs in this case. This statute and rule are unconstitutional on their face because they deny Plaintiffs, who are similarly situated to the complainants before the HCRC, the equal protection of the laws.

Accordingly, the Court finds that HRS § 368-12 and HAR 12-46-20 that permit only complainants to bypass the HCRC administrative proceedings and access their fundamental

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**First Circuit Court, Civil No. 01-1-0776-03 DTK (Declaratory Judgment)**

right to jury trial, are unconstitutional because they violate the guarantees of Article I, Sections 5 and 13 of the Hawai'i Constitution and the 14<sup>th</sup> Amendment of the United States Constitution, and they are not narrowly tailored to avoid the unnecessary abridgment of constitutional rights.

Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT THE MOTION IS GRANTED. The HCRC is enjoined from any further proceedings in the cases involving Plaintiffs until Plaintiffs are given a right to opt out of the HCRC administrative proceedings and seek a jury trial in the Circuit Court on the common law damage claims alleged in the HCRC docketed cases. However, the Court specifically limits its holding to the parties herein and by this Order does not prohibit the HCRC from continuing its activities with respect to other claims brought by complainants before the HCRC.

DATED: Honolulu, Hawai'i,                     , 2001.

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JUDGE OF THE ABOVE ENTITLED COURT

APPROVED AS TO FORM:

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JOHN ISHIHARA, ESQ.  
Attorney for Defendants  
HARRY YEE, FAYE KENNEDY,  
JACK LAW, JUNE MOTOKAWA,  
and ALLICYN HIKIDA-TASAKA, in their  
official capacities as Commissioners  
of the HAWAI'I CIVIL RIGHTS  
COMMISSION, DEPARTMENT OF LABOR  
& INDUSTRIAL RELATIONS, STATE OF HAWAI'I

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APRIL WILSON SOUTH, ESQ.

Attorney for Defendant

WILLIAM D. HOSHIJO, in his official capacity  
as Executive Director of the HAWAII CIVIL  
RIGHTS COMMISSION, DEPARTMENT  
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GALE L.F. CHING, ESQ.

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DARRYLLYNNE SIMS

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DARWIN L.D. CHING, ESQ.

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TAMMY QUINATA

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